BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Complaint of	:	
	:	
AMERICAN AIRLINES, INC.	:	
FEDERAL EXPRESS CORPORATION	:	
UNITED AIR LINES, INC.	:	
UNITED PARCEL SERVICE CO.	:	
	:	
against	:	Docket OST-03-15092
	:	
AEROLINEAS ARGENTINAS, S.A.	:	
AIR PLUS ARGENTINA, S.A.	:	
SOUTHERN WINDS, S.A.	:	
and	:	
THE GOVERNMENT OF ARGENTINA	:	
	:	
under Section 2(b) of the International Air Transportation	:	
Fair Competitive Practices Act, as amended	:	

JOINT REPLY OF AMERICAN AIRLINES, INC.,
FEDERAL EXPRESS CORPORATION, UNITED AIR LINES, INC.,
AND UNITED PARCEL SERVICE CO.

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May 21, 2003

BEFORE THE
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WASHINGTON, D.C.

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JOINT REPLY OF AMERICAN AIRLINES, INC.,
FEDERAL EXPRESS CORPORATION, UNITED AIR LINES, INC.,
AND UNITED PARCEL SERVICE CO.

American Airlines, Inc. ("American"), Federal Express Corporation ("FedEx"), United Air Lines, Inc. ("United") and United Parcel Service Co. ("UPS") jointly submit the following reply to the answers of Aerolineas Argentinas, S.A. ("Aerolineas") and Southern Winds, S.A. filed in the above-captioned proceeding:

1. Neither Aerolineas nor Southern Winds denies that the U.S. carriers serving Buenos Aires International Airport ("EZE") are paying discriminatory fees for airport services. This discrimination arises initially, as both Aerolineas and Southern Winds agree, from the action of Argentina's Executive Branch in Decree 577/2002 which increased the "dollarized" fees for airport services at EZE by setting them at an exchange rate of three pesos for one dollar.

This action was contrary to legislation enacted by the Argentine Congress requiring that such dollarized fees be converted into pesos at no more than a one-to-one rate and could not be increased by suppliers. The U.S. carriers serving EZE as well as Aerolineas and certain other foreign carriers challenged the legality of the original Executive Decree as well as a subsequent amendment, but only Aerolineas has been successful in procuring an order enjoining the collection from it of the increased fees set under the Decree.[1] The combination of the unjustified dollarization Decree and the judicial injunctive relief exclusively applied to Aerolineas has resulted in discrimination against the U.S. carriers serving EZE that is contrary to the U.S./Argentina bilateral air services agreement. The U.S. carriers serving EZE have, therefore, properly sought from the Department relief against this discrimination under Section 2(b) of the International Air Transportation Fair Competitive Practices Act, as amended, 49 USC §41310 ("IATFCPA").

2. Both Aerolineas and Southern Winds argue that because the discrimination complained of is a result of the combination of actions of the executive and judicial branches of the Argentine government, the Department should not intervene to grant relief to U.S. carriers under the IATFCPA. Aerolineas and Southern Winds also argue that the U.S. should not act to eliminate this discrimination because of pending cases before the Argentine judiciary that could, in the final result, restore nondiscriminatory fees. Ironically, the carriers each predict different outcomes in the pending court cases. Aerolineas is of the opinion that the discrimination will be

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[1] In the case of some foreign carriers, the airport operator has been required to pay a portion of the increased fee into an escrow account, but these carriers are still required to pay the full amount of the increased fee under the Decree. No such set aside has been ordered in the case of the fees paid by the U.S. carriers serving EZE.

eliminated by a ruling of the Argentine Supreme Court that finds Executive Branch Decree to be unlawful, restoring airport fees for all carriers to the previous level (Aerolineas Answer at 5). Southern Winds, on the other hand, has cited the Executive Branch's appeal against the judicial decision enjoining application of the decree to Aerolineas and asserts that by this action the Executive Branch "is more than complying with its duties under the Air Transport Agreement to ensure an equal opportunity for the carriers of both parties to fairly compete." (Southern Winds Answer at 6). Thus, Southern Winds, which chose not to seek judicial relief from the Decree, seems to believe that the appeal of the Executive Branch will prevail and re-establish fares at levels consistent with the Decree to be paid by all carriers, including Aerolineas.

These diametrically opposing predictions of the outcome of pending judicial proceedings in Argentina demonstrate why the Department should not rely on the arguments of Aerolineas and Southern Winds. Indeed, similar arguments were previously rejected by the Department in the case of *American Airlines v. the Government of Chile, et. al.*, Order 93-11-22. In that case, it was argued that the discriminatory action complained of was caused not by the Chilean government's executive branch but by an order of an independent administrative agency which had stayed the issuance of new operating authority that had been requested by a U.S. carrier under the U.S./Chile bilateral air services agreement. Similarly here, the Argentine carriers argue that it is the judicial branch, not the executive, which caused the discrimination complained of. In the *Chile* case it was further argued, as do Aerolineas and Southern Winds here, that the Department should await the outcome of pending review proceedings before ruling on the IATFCPA complaint.

The Department's rejection of those arguments in the *Chile* case apply with equal weight here:

> We are unpersuaded by the Chilean carrier arguments that Chile has not violated the bilateral agreement because the Anti-Monopoly Commission is an independent tribunal, and the stay order is only an interim measure to preserve the *status quo* while a claim under Chilean antitrust law is litigated. . . . The provisions of the [air services] agreements not only state rights of the parties, but also obligations to ensure effectiveness of the rights. The fact that Lan-Chile and Ladeco have sought to restrict American's rights through their suit before the Chilean Anti-Monopoly Commission does not relieve Chile of its obligations under those agreements. The fact that the Anti-Monopoly Commission measure may be interim does not alter its effect. American's access is denied now, and the government's bilateral obligation to ensure that access under international law is not tolled during some interim civil process.

Order 93-11-22 at 6-7 (Footnote omitted). *See also Flying Tiger Line v. Government of Brazil, et al.*, Order 84-1-83 (CAB rejected similar arguments relating to discriminatory actions taken by independent Brazilian agencies which were purportedly needed to address an economic emergency).

In the same way here, the fact that the pending judicial proceedings may result in the elimination of the discrimination does not mean that the discrimination by Argentina should be tolerated in the interim period. Such "interim discrimination" was rejected by the Department in the case of Chile and should be rejected for the same reasons here. It is well within the prerogative of the Argentine Executive Branch to eliminate the discrimination. The Executive Branch imposed the higher fee by the Decree and it can equally well withdraw or stay the effectiveness of the Decree as to all parties, including the U.S. carriers serving EZE, pending the completion of judicial proceedings. The Decree was enacted unilaterally by the Executive Branch (which was one of the arguments cited against it in the judicial proceedings), and it can equally well be withdrawn or suspended unilaterally by the same agency. No action of any Argentine judicial or legislative body is needed to eliminate the discrimination. It is the failure

of the Executive Branch to act within its own powers to eliminate this discrimination that gives rise to this complaint. All efforts by the U.S. carriers in Argentina to achieve that result have failed, leaving joint complainants no alternative but to seek intervention by the U.S. government under the bilateral agreement and IATFCPA.

3. Contrary to the suggestions of Aerolineas and Southern Winds, there is no need to resort to further judicial, executive branch or diplomatic appeals in Argentina. The U.S. carriers serving EZE have actively pursued all available remedies in the courts, through diplomatic channels and with the Executive Branch directly. These efforts are documented in the Joint Complaint and will not be repeated here. All requests for remedies have been denied or ignored, and the discriminatory pricing regime is causing continuing economic injury to U.S. carriers on a daily basis. The carriers have actively sought reduction of the fees imposed under the Decree through various levels of the Argentine government for over a year. Nevertheless, the discriminatory application of the Decree has continued unabated since last September.

Aerolineas suggests that the matter will likely be resolved by the Argentine judiciary "in short order" and urges the Department to give the "Argentine judicial system a chance to solve" the problem. (Aerolineas Answer at 5-6). In fact, it has been largely because the U.S. carriers have relied up to now upon the Argentine judicial system that they find themselves faced with the continuing discriminatory charges. The Department is no more required to defer to the Argentine legal system than it was to that of Chile in 1993 or that of Brazil in 1984 when it granted complaints to relieve U.S. carriers from discriminatory actions caused by independent agencies of foreign governments. The Argentine system has been given more than an adequate chance to resolve this problem, and it has manifestly failed to do so.

The U.S. government should not tolerate any further discriminatory application of the EZE fees against U.S. carriers. The granting of the instant complaint is the only means left to get the attention of the only agency of the Argentine government that has the power to fix this problem without further delay -- the Executive Branch.

4. Southern Winds urges that the complaint should be dismissed as against it. This is based on Southern Winds decision to accept the fees imposed by the Decree without seeking judicial relief such as that sought by the U.S. carriers and Aerolineas, as well as certain other foreign carriers. Southern Winds does not explain why it has accepted the three-fold fee increase under the Decree but this may to some extent be due to the fact that, according to Aerolineas, fees for domestic air services were not increased by the Decree. (Aerolineas Answer at 3). Because relatively more of Southern Winds' services are operated in domestic markets, Southern Winds may well have been less affected by the fee increase than other carriers For whatever reason, Southern Winds chose voluntarily to accept the higher fees for international services.[2]

Southern Winds goes on to argue that because it had nothing to do with the fee increase and voluntarily chose to accept the higher fees, it should be exempt from whatever relief the Department issues in this proceeding. This is a fairly typical complaint by foreign carriers when their governments discriminate against U.S. carriers and sanctions are imposed on such

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[2] There have been reports that a major owner of Southern Winds also has a substantial ownership interest in Aeropuertos Argentina 2000, which in turn owns, *inter alia,* Ezeiza Airport. *See* <www.aeropuertosarg.com.ar/Lineas_Aereas/SW/engsw.html> The conflict arising from a common ownership interest between the payor and the payee of the increased fee may well explain why Southern Winds chose not to challenge the airport fee increase. It is also an additional reason why Southern Winds, one of whose owners benefits from the fee increase, should not be exempted from any sanctions that the Department imposes in response to this complaint.

carriers for actions taken by government agencies over which they have no control. Southern Winds is, however, enjoying fair and equal treatment in the U.S. under the applicable bilateral agreement, while its government is denying such treatment to U.S. carriers under the same agreements. In this circumstance, sanctions against Argentine carriers are appropriate. *See Aeronaves del Peru and Faucett,* Order 83-6-20, May 18, 1983, at 6-7 ("when Congress expanded our powers in IATCA, it left no question that where necessary to ensure the fair treatment of U.S. carriers by foreign governments, we could proceed directly against the authority of foreign carriers. . . . Congress recognized that action against a foreign carrier might be the only way to motivate that carrier's government to accord U.S. carriers the market access they sought and deserved"). (Footnote omitted.)

5. Southern Winds also suggests that the joint complainants have somehow abused the Department's process because they have requested sanctions against Southern Winds. Thus, Southern Winds asserts that the complainants "know full well that Southern Winds pays the same level of fees and charges at EZE as they do" and suggests that the complainants are guilty of somehow "omitting critical facts . . . and 'spinning' the remaining facts . . ." (Southern Winds Answer at 2, 14.)

Although Southern Winds has chosen to go somewhat over the top in seeking to escape application of sanctions, it nevertheless concedes that the U.S. carriers are, indeed, subject to the very discrimination of which they complain. The U.S. carriers serving EZE have no knowledge of what fees Southern Winds is actually paying at EZE. They did not claim that Southern Winds had sought or obtained judicial relief similar to that obtained by Aerolineas. Nor do they have any knowledge of why Southern Winds chose voluntarily to accept the higher fees imposed by the Decree. What the U.S. carriers do know is that Southern Winds is enjoying

the benefits to which it is entitled under the U.S./Argentina agreement, which is nondiscriminatory access to U.S. markets. To the extent that U.S. carriers are not enjoying reciprocal nondiscriminatory access to Argentina due to discrimination by Southern Winds' homeland, there is nothing unfair in imposing sanctions on that carrier as well as others, such as Aerolineas. To the extent that Southern Winds has chosen for its own reasons, which are notably not disclosed in its answer, to pay the higher charges from which Aerolineas was discriminatorily relieved, this should have no bearing on what sanctions the Department imposes or on which carriers they are imposed.

6. Finally, neither Aerolineas nor Southern Winds addresses the question of the reasonableness of the three-fold increase in the EZE airport fees. As noted above, Aerolineas concedes that the increase applied to international services only, leaving fees for domestic services unchanged. It defies belief that the de-linkage of the peso from the dollar increased airport costs for international services by a factor of three while the costs at the same airports for domestic services were affected not at all.[3] Moreover, as noted on our joint complaint, the fee increase for international services cannot in any event reasonably be attributed to the de-linking of the dollar and the peso since the airport operator is paying most of its costs in pesos, not dollars.

The U.S. carriers serving EZE do not have access to the detailed cost accounts for the operation of EZE. The actions by the Executive Branch in per-emptorily hiking fees without reference to cost increases and without consulting with the users is, however, contrary to well-

[3] Indeed, at EZE and the other airport serving Buenos Aires ("AEP") international flights are charged at a rate three times the charges for domestic flights even though both types of flights are receiving identical services from the same airport operators.

established international standards. This action violates not only Article VII of the U.S./Argentina Air Services Agreement but also Article 15 of the Chicago Convention. *See also* ICAO, *Policies on Charges for Airports and Air Navigation Services* (6th ed., 2001) at 12, para. 31, (citing the importance of consultations with users prior to imposing changes in airport fees).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Joint Reply on the following persons:

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DATED: May 21, 2003